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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 12, 2021

Mr. Charles Maguire, Director
1201 Elm St
Dallas, Texas 75270

Dear Mr. Maguire:

The Texas Commission on Environmental Quality (TCEQ or Commission) is in receipt of the U.S. Environmental Protection Agency's (EPA) letter rescinding its permit review waiver for desalination facilities, including Port of Corpus Christi Authority of Nueces County (POCC) - TPDES Permit No. WQ005253000, TX0138347 (POCC Permit). Respectfully, the Memorandum of Agreement (MOA) does not allow EPA to revoke the waiver with respect to the POCC Permit.

First, under the clear terms of the MOA, EPA may only terminate its waiver of *future* TCEQ permit actions¹ (emphasis added). Because the POCC permitting action is not a *future* permit action, EPA does not have authority to terminate its waiver of the POCC application. As noted below, the Executive Director prepared a draft permit based on the application submitted by POCC in March 2018, and a revised draft permit based on the additional information submitted by POCC in June 2021. Since the Executive Director has drafted a permit, EPA cannot rescind the waiver of its review of POCC's application.

For the POCC Permit specifically, EPA had ample opportunity to engage with TCEQ on this matter, as the permit application was filed in March of 2018. During that three-and-a-half year period, EPA did not provide comments to TCEQ throughout the lengthy public comment period on the application, did not seek to participate in a Contested Case Hearing (CCH) before the State Office of Administrative Hearings (SOAH), and did not participate in any discussions regarding the POCC Permit in a timely manner.

Over the past three-and-a-half years, the Executive Director performed a thorough administrative and technical review of the POCC Permit application, prepared a draft permit, held a public meeting in Port Aransas on April 8, 2019, prepared a Response to Comments (filed July 3, 2019), and participated in a CCH before SOAH from July 9, 2020 through November 10, 2020. The Administrative Law Judges' (ALJ) Proposal for Decision was considered by the Commission on May 19, 2021.

As you know, the Commission remanded the application to SOAH to take additional evidence on six issues. The POCC provided an amended application on June 25, 2021, and additional information on July 28, 2021. As a result of the amended application, the Executive Director

¹ MOA Between TCEQ and EPA, Item IV.C.8.

performed another full administrative and technical review and prepared a revised draft permit. The revised draft POCC Permit complies with or exceeds all applicable federal and state statutes, rules, and policies to protect water quality and the environment. For example:

- The draft permit was developed consistent with the EPA-approved Procedures to Implement the Texas Surface Water Quality Standards that outlines the process by which discharges are evaluated and ensures compliance with the water quality criteria contained within the Texas Surface Water Quality Standards at Title 30, Texas Administrative Code, Chapter 307.
- TCEQ used salinity data collected at TCEQ's Surface Water Quality Monitoring stations and other information to calculate salinities associated with the proposed discharge at the edge of the mixing zone, as well as calculations of salinity levels beyond the mixing zone.
- The calculations of the salinity levels beyond the mixing zone indicate the proposed discharge will not detrimentally affect salinity gradients in the receiving water.
- The draft permit includes biomonitoring requirements that are above and beyond state and federal requirements.

The MOA only allows prospective withdrawal of waivers for good reason: to preserve public resources and ensure that comments are made at a point in the process where they can reasonably be incorporated. As a result of the complexity of the POCC application, TCEQ has already spent considerable time and public resources on its review, including the review of the additional information provided by the POCC in June and July 2021. The Executive Director estimates that, to date, technical staff has spent 660 hours preparing for the SOAH hearing, 500 hours participating in the SOAH hearing, and 260 hours post-hearing. We also estimate legal staff spent 210 hours preparing for the SOAH hearing, 130 hours participating in the SOAH hearing, and 160 hours post-hearing. Currently, TCEQ staff have spent over 1,500 hours working on this specific permitting matter. It is worth noting this does not include the additional time our technical and legal staff will be required to spend preparing for the upcoming SOAH hearing. The parties are currently conducting depositions and have submitted an Agreed Proposed Procedural Schedule to the SOAH ALJ. Once the CCH before SOAH concludes, the matter will be set for additional argument and final disposition before the Commission.

Adding more delays to an already lengthy permitting process will cause all parties to unnecessarily spend additional resources, including public resources. As you know, without considering additional time for EPA review, the permit review process already often takes several years.

Furthermore, the MOA clearly waives EPA review of the POCC Permit application. The proposed POCC facility is a Minor facility, and thus not subject to EPA review under the MOA. TCEQ staff used EPA's own Major/Minor worksheet to determine a numeric rating for the potential toxicity of the effluent generated by the POCC.² The Major/Minor determination, which is EPA's document, takes into account the toxic pollutant potential of the industrial activity, the effluent flow volume, discharge of conventional pollutants (including oxygen-demanding pollutants, total suspended solids, and nitrogen pollutants), public health impacts, water quality factors, and proximity to coastal waters. If the facility numeric rating is over a certain threshold (i.e., 80), the facility is classified as a Major. If a facility's Major/Minor classification is changed, the new classification takes effect upon permit issuance. Attached is the EPA worksheet used to

² See Attachment, Major/Minor Worksheet.

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determine whether the permit is a major or minor. In this case the summation was 44.5, thus classified as Minor facility.

Finally, even if the POCC application were subject to EPA review, EPA did not specify any applicable provision of federal or state statutes or rules with which the POCC Permit does not comply. Thus, EPA still does not meet its obligations under the terms of the MOA, and the MOA does not allow EPA to revoke the waiver with respect to the POCC Permit.

Historically, TCEQ and EPA have enjoyed a mutually beneficial state-federal relationship regarding TCEQ's delegated programs and have had open and clear communication. We hope that, in the future, EPA engages with Texas in a meaningful, timely way.

Please contact Earl Lott, Director of Office of Water by phone at (512) 239-2047 or by email at Earl.Lott@tceq.texas.gov

with any questions.

Sincerely,

Earl Lott

Earl Lott, Director
Office of Water
Texas Commission on Environmental Quality

Enclosure: Major/Minor Worksheet